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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

Charles Ransier,
Appellant,
v.
The State of Texas,
Appellee.

14-17-00580-CR
In the Fourteenth Court of Appeals
Houston, Texas

ON APPEAL FROM THE 207th DISTRICT COURT, COMAL COUNTY, TEXAS TRIAL COURT CAUSE NO. CR2016-303

BRIEF FOR APPELLANT ON DISCRETIONARY REVIEW

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Statement of the Case

On April 27, 2016, a Comal County Grand Jury returned an indictment charging the Appellant, Charles Ransier, with tampering with physical evidence, enhanced to habitual offender status. (1 CR2016-303 5). Subsequently, on January 4, 2017, a Comal County Grand Jury returned an indictment charging Mr. Ransier with possession of a controlled substance, less than one gram, enhanced to a second-degree felony. (1 CR2017-004 5). For purposes of trial, the above offenses were joined. (2 RR 4-5).

On June 26, 2017, after being duly selected, a jury was sworn. (2 RR 189). Mr. Ransier entered a plea of not guilty to both of the charges, as alleged in the indictments. (2 RR 201-02). After a trial on the merits, the jury subsequently found Mr. Ransier guilty of both charges. (6 RR 109). The jury further assessed punishment for the possession of a controlled substance charge at 20 years in the Texas Department of Criminal Justice Institutional Division, and a fine of $10,000.00, and for the tampering with physical evidence charge, assessed punishment at life in the Texas Department of Criminal Justice Institutional Division. (8 RR 145). Mr. Ransier was sentenced in opened court on June 28, 2017. (2 CR2016-303 72). The Fourteenth Court of Appeals reversed Mr. Ransier's conviction for tampering with physical evidence, and affirmed the conviction for

possession of a controlled substance.

Statement Regarding Oral Argument

The Court has declined to grant oral argument, and the case will be submitted on the parties' briefs.

Statement of Facts

On March 23, 2015, Sergeant David Kral, a Sergeant with the Texas Department of Public Safety was working routine patrol on Interstate 35 in Comal County, Texas. (3 RR 33, 39). During his patrol, he noticed a plastic children's slide on the access road, and intended to take the slide home to his children after his shift. (3 RR 33). At some point, Sergeant Kral noticed that the slide had been slightly moved from the position he originally saw it in, and that a truck was also now located in the area. (3 RR 34). Trooper Kral decided to investigate the situation, and identified the person in the parked truck as Mr. Ransier. (3 RR 34).

Instead of Sergeant Kral conducting a search of Mr. Ransier's vehicle, Sergeant Kral directed Mr. Ransier to remove items from his truck for Sergeant Kral's inspection. (3 RR 36); (1 SRR 26). At some point during Mr. Ransier removing items from his truck at the direction of Sergeant Kral, Sergeant Kral witnessed Mr. Ransier "shoving his right hand underneath the driver's side seat" of Mr. Ransier's truck. (3 RR 37). Sergeant Kral was

able to immediately see that Mr. Ransier was holding a syringe in his hand. (3 RR 37, 44, 49). Sergeant Kral testified that Mr. Raniser was "trying to get it [the syringe] under there", and that he believed that Mr. Ransier was "actively trying to break it [the syringe] and shove it [the syringe] underneath the seat." (3 RR 37-38).

Sergeant Kral instructed Mr. Ransier to step away from the truck. (3 RR 38). Mr. Ransier did not comply, so Sergeant Kral "ripped him [Mr. Ransier] out of the truck," and threw Mr. Ransier about five feet into a cactus. (3 RR 38). Mr. Ransier ended up on the ground, and Sergeant Kral got on top of Mr. Ransier and handcuffed him. (3 RR 38). The syringe landed about two feet from Mr. Ransier. (3 RR 39). Sergeant Kral recovered the syringe, however, a needle that was allegedly broken off of the syringe was never recovered. (3 RR 39).

Sergeant Kral conceded that he did not know what condition the syringe was in prior to Mr. Ransier holding it in his hand, allowing the inference that it was entirely possible that the syringe did not have a needle attached to it the evening of the alleged offense. (3 RR 44). Further, Sergeant Kral conceded that he never notated in his offense report that Mr. Ransier actually broke the needle off of the syringe, or ever made such an assertion during the four hours of video pertaining to the case. (3 RR 44-

48). More importantly, Sergeant Kral conceded that he does not know where the needle of the syringe is, and that he never photographed the needle, or took the needle into evidence. (3 RR 45).

Additionally, Sergeant Kral acknowledged that it was possible that the act of forcefully throwing Mr. Ransier to the ground could have caused the needle to detach from the syringe. (3 RR 47). Further, Sergeant Kral admitted that he knew where the syringe was at all times from the point when he first saw the syringe in Mr. Ransier's hand. (3 RR 49).

The Defense requested a jury instruction on the lesser-included offense of attempted tampering with physical evidence. (3 RR 81). The trial court first granted the lesser-included offense of attempted tampering with physical evidence instruction, but then ultimately denied said instruction with the caveat that the State could be risking a reversal on the issue on appeal. (3 RR 82-84).

Summary of the Argument

There is more than a scintilla of evidence in the record below to support a jury rationally finding that, if Mr. Ransier was guilty, he was guilty only of the lesser-included offense of attempted tampering with physical evidence. The relevant inquiry should not be whether or not the evidence forecloses the possibility of a conviction on the charged offense of tampering with

physical evidence, but rather, whether or not a jury could reasonably interpret the evidence in the record below to support a lesser charge of attempted tampering with physical evidence. Moreover, this Court has repeatedly emphasized that when conducting a lesser-included offense analysis, the Court should not attempt to step into the shoes of the jury, whose job it is to assess the overall credibility of the evidence and resolve any conflicts in the evidence. The lesser-included offense instruction should have been contained within in the jury charge, as there is evidence below that supports an inference that Mr. Ransier did not alter, destroy, or conceal the syringe, and a jury that accepted that inference could rationally believe that Mr. Ransier only committed the lesser-included offense of attempted tampering with physical evidence.

The failure to instruct the jury on the lesser-included offense is so significant in this case, because if the jury had found Mr. Ransier guilty of only the lesser-included offense, then Mr. Ransier's maximum sentence would be capped at twenty years in prison, instead of the life sentence that he received. The State has highlighted to the Court facts that were not even admitted before the jury in an attempt to paint Mr. Ransier in a negative light. However, Mr. Ransier would respectfully shift the Court's attention to the very basic fact that Mr. Ransier should never have even been put in the

situation where he was essentially searching his own vehicle at the direction of law enforcement, and if law enforcement had just properly conducted a search of Mr. Ransier's vehicle, Mr. Ransier would only have a possession charge and the current issue would not be before the Court.

Mr. Ransier would also urge the Court to take into consideration that the trial court even cautioned the State below on the record that this very issue could result in a reversal on appeal, yet, instead of simply trusting that the fact finder could rationally weigh the evidence if presented with a lesser-included offense, the State opted to take the lesser-included offense away from the jury's consideration. Now, the State urges the Honorable Court to improperly impose itself as a thirteenth juror in evaluating the quality or strength of the evidence below, when in the interest of judicial economy, the State should have just allowed the lesser-included offense instruction that the trial court was inclined to grant and allow the jury to resolve the issue.

Response to the State's Ground for Review

Lesser-Included Offense Instructions Standard

In determining whether or not a defendant is entitled to a lesser-included offense instruction, the evidence must be evaluated in the context of the entire record. *Goad v. State*, 354 S.W.3d 443, 446 (Tex.Crim.App. 2011). If evidence from any source raises the issue of a lesser-included

offense, then the trial court should grant the request, regardless of whether the evidence is weak or strong, unimpeached, or contradicted. *Moore v. State*, 969 S.W.2d 4 (Tex.Crim.App. 1998); *Hall v. State*, 158 S.W.3d 470 (Tex.Crim.App. 2005). A defendant is entitled to an instruction on a lesser-included offense when there is some evidence-i.e., more than a scintilla- in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Rice v. State*, 333 S.W.3d 140, 145 (Tex.Crim.App. 2011). Additionally, this Court has articulated regarding the lesser-included offense analysis that, "the standard may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subjected to different interpretations." *Sweed v. State*. 351 S.W.3d 63, 68 (Tex.Crim.App. 2011). Moreover, the jury has broad discretion, as the fact-finder, to make judgments on the credibility of the evidence, as well as make reasonable inferences from such evidence. *Griffin v. State*, 491 S.W.3d 771, 774 (Tex.Crim.App. 2016). Therefore, in conducting its analysis, this Court should not consider the credibility of the evidence or whether or not it conflicts with other evidence or is controverted. *Banda v. State*, 890 S.W.2d 42, 60 (Tex.Crim.App. 1994).

In order to find Mr. Ransier guilty of only attempted tampering with

physical evidence, the jury would be required to determine that Mr. Ransier intended to alter, destroy, or conceal the syringe, so as to impair the syringe's verity, legibility, or availability as evidence, Mr. Ransier did an act amounting to more than mere preparation, but Mr. Ransier failed to effect the completed tampering of the physical evidence- he failed to actually alter, destroy, or conceal the syringe, so as to impair the syringe's verity, legibility, or availability as evidence. Mr. Ransier contends that the record below supports that more than a scintilla of evidence exists from which a jury could conclude that Mr. Ransier was guilty only of attempted tampering, and therefore the Fourteenth Court of Appeal's reversal of his conviction below should be affirmed by this Honorable Court.

Alteration or Destruction

First, Based on the totality of the record below, it is possible that a jury could have rationally found that if Mr. Ransier was guilty, he was only guilty of the lesser-included offense of attempted tampering with physical evidence, with regard to altering or destroying the syringe. *Rice v. State*, 333 S.W.3d 140, 145 (Tex.Crim.App. 2011).

Mr. Ransier maintains that the syringe in question was not destroyed, as it still existed, and the State was still able to obtain evidence, the controlled substance, from the syringe. *Rabb v. State*, 434 S.W.3d 613, 617

(Tex.Crim.App. 2014); *Williams v. State*, 270 S.W.3d 140, 144 (Tex.Crim.App. 2008). The Oxford Language Dictionary defines "destroy" as "put an end to the existence of (something) by damaging or attacking it." The record below reflects that the syringe was admitted into evidence and that Sergeant Kral confirmed that the syringe still had evidentiary value. (STATE'S EXHIBIT NUMBER 3); (3 RR 48).

This Court has recently held that when a defendant is alleged to have altered a physical thing, "alter" means that a defendant changed or modified that thing. *Stahmann v. State*, 602 S.W.3d 573, 579 (Tex.Crim.App. 2020). The State is contending that Mr. Ransier successfully altered the syringe in the case at hand, because Mr. Ransier broke the needle off of the syringe. (STATE'S BRIEF 8). However, Mr. Ransier contends that the record is not only unclear regarding what caused the needle to detach from the syringe, but also ambiguous as to whether or not a needle was ever even attached to the syringe the evening of the alleged offense.

First and foremost, it is essential to this Court's analysis regarding alteration that the needle that allegedly detached from the syringe was never actually located and collected as evidence, despite the fact that two Texas Rangers, a Texas Department of Public Safety CID agent, and a State Trooper conducted a thorough search of the scene. (3 RR 142-143). For, if

a needle had been located on the floorboard of the vehicle where Sergeant Kral allegedly witnessed Mr. Ransier trying to hide or break the syringe, then there would be concrete evidence that Mr. Ransier had successfully altered the syringe, and this would foreclose the possibility that Mr. Ransier was entitled to a lesser-included instruction of attempted tampering with physical evidence. Tex. Penal Code § 37.09. However, the testimony below, when combined with the fact that an extremely thorough search was conducted of Mr. Ransier's vehicle, leads to the logical inference that the needle was detached from the syringe at some point during the short space of time that Sergeant Kral forcibly threw Mr. Ransier out of his vehicle. (3 RR 142-143). The following testimony of Sergeant Kral below supports the conclusion that the needle detached from the syringe outside of the vehicle:

"Q. Okay. So the needle at the point **that is ended up on the ground**, was it next to the syringe?

A. I am not sure.

Q. Did you ever memorialize the needle itself, taking pictures of it or anything?

A. No, sir.

Q. Where is that needle?

A. I have no clue.

Q. So did it stay at the scene?

A. Quite possibly." (3 RR 45).

Even the State seems to agree that the record reflects that the needle detached from the syringe somewhere outside of Mr. Ransier's vehicle, meaning it detached during that flash of an instant that Sergeant Kral flung Mr. Ransier out of his vehicle. For, the State asserts in its briefing to the Court that, "the fact that Trooper Kral did not recover a 'needle in a haystack'—or a large patch of grass, in this case—is not affirmative evidence that there was no needle." (STATE'S BRIEF 13). For the above reasons, Mr. Ransier asserts that the logical interpretation from evaluating the evidence is that the needle was broken off of the syringe when Sergeant Kral hurled Mr. Ransier out of Mr. Ransier's vehicle. *Id*.

Next, Mr. Ransier maintains that the jury could have rationally determined that the force of Mr. Ransier being thrown out of his vehicle is what caused the needle to break off of the syringe, making Mr. Ransier only liable for attempting to alter the syringe. (STATE'S EXHIBIT NUMBER 1). State's Exhibit Number One, the dashboard footage from Sergeant Kral's patrol vehicle, depicts, that in one fell swoop, Sergeant Kral "ripped" Mr. Ransier out of his vehicle and then forcibly threw Mr. Ransier about five feet from Mr. Ransier's vehicle into a cactus. (STATE'S EXHIBIT

NUMBER ONE); (3 RR 38, 47). Mr. Ransier maintains that this video alone, is sufficient evidence to cast doubt on the State's theory that Mr. Ransier actually altered the syringe by breaking the needle. (STATE'S EXHIBIT NUMBER ONE); (3 RR 47).

However, further bolstering Mr. Ransier's contention that there is more than a scintilla of evidence that Mr. Ransier did not alter the syringe, is the fact that Sergeant Kral, the State's only witness to the alleged offense of tampering with the syringe, conceded below that it was possible that the act of forcibly throwing Mr. Ransier to the ground could have caused the needle to detach from the syringe. (3 RR 47). Mr. Ransier's trial counsel asked Sergeant Kral, "Now, do you know whether or not you throwing him to the ground and him having the needle in his hand whether it was possible that the act of falling to the ground as a result of you putting him there caused the needle to break off," to which Sergeant Kral responded, "I couldn't make that determination, no, sir." (3 RR 47). The State argues that Mr. Ransier and the Fourteenth Court of Appeals is examining Sergeant Kral's testimony in a vacuum, and taking this concession out of context. (STATE'S BRIEF 13-14). However, Mr. Ransier would contend that a jury could easily interpret this testimony to be a concession by Sergeant Kral that his conduct could have caused the needle to detach from the syringe, as the lower court

and Mr. Ransier both interpret the testimony this way. *Sweed v. State*. 351 S.W.3d 63, 68 (Tex.Crim.App. 2011).

Additionally, Mr. Ransier further counters the State's argument that Sergeant Kral's testimony is being plucked out of the record and taken out of context with the fact that Sergeant Kral never once documented in his report that Mr. Ransier actually broke the syringe, never made this assertion on any of the videos depicting Sergeant Kral's interactions with Mr. Ransier, and never specifically stated on the record when and how Mr. Ransier actually broke the syringe. (3 RR 44-45). Moreover, instead of explaining how and when Mr. Ransier broke the needle off of the syringe through his testimony, Sergeant Kral repeatedly testified below how Mr. Ransier was only "trying" to break the syringe, when he testified regarding Mr. Ransier's actions that, "he was actively **trying** to break it and shove it [the syringe] underneath the seat," he was still actively **trying** to break it [the syringe] and shove it under the seat." (3 RR 38).

Furthermore, during the interview of Mr. Ransier admitted into evidence as State's Exhibit Number Two, Sergeant Kral only asked Mr. Ransier if Mr. Ransier was "trying" to break the syringe. (STATE'S EXHIBIT NUMBER 2). During State's Exhibit Number Two, Sergeant Kral asks Mr. Ransier, "when you were going back inside of the truck, and

you were going after that syringe, were you **trying** to break it or **trying** to get rid of it," and Mr. Ransier responds, "that was the intention, yes, sir." (STATE'S EXHIBIT NUMBER TWO). Sergeant Kral never asks Mr. Ransier, "Did you actually break the syringe," and perhaps more importantly never even attempts to clarify with Mr. Ransier the original condition of the syringe, and that a needle was attached to the syringe. (STATE'S EXHIBIT NUMBER TWO).

The Fourteenth Court of Appeals opinion dismissing the State's Motion for Rehearing, correctly concluded that, "a rational jury may have also reasonably inferred the opposite conclusion; that although appellant had specific intent to break the syringe before Kral pulled him out of the truck, Kral's pulling him out of the truck and onto the ground disrupted appellant's commission of the offense." The Fourteenth Court of Appeals cited to this Court's opinion in *Goad v. State* to support this proposition. *Goad v. State*, 354 S.W.3d 443 (Tex.Crim.App. 2011). In *Goad v. State*, this Court held that the defendant, who was convicted of burglary of a habitation, was entitled to a lesser-included offense instruction of criminal trespass. *Id*. at 449. In *Goad*, there was some evidence in the record that the defendant only entered the alleged victim's home to look for his dog, not to commit a theft. *Id*. This Court stated that "[E]ven if one could not logically deduce from

this evidence that Goad must have lacked intent to commit theft, that is not the proper standard of our analysis." *Id*. Similarly here, while Mr. Ransier may have admitted to having the intent to alter the syringe, so that a jury could not logically deduce from the evidence that he lacked the specific intent to commit tampering that does not necessarily equate to the conclusion that he actually accomplished the act of tampering. *Id*.

Mr. Ransier would urge the Court to follow the logic of this Court's decision in *Bullock v. State*, and hold that there is more that a scintilla of evidence in the record below from which a rational jury could have found that Mr. Ransier committed the elements of attempted tampering with evidence by alteration but not the elements of tampering with evidence by alteration. *Bullock v. State*, 509 S.W.3d 921 (Tex.Crim.App. 2016).

In *Bullock*, the defendant was convicted of theft of a delivery truck. *Id*. at 922. During trial, the owner of the delivery truck testified that he heard the engine to his vehicle start and rev several times, and saw the defendant with his hands on the steering wheel and his foot pushing the petal. *Id*. at 923. The owner confronted the defendant, and the defendant ran away. *Id*. Additionally, the defendant admitted at trial that he was inside of the truck, but denied having the intent to steal the truck, and that he only wanted to steal small items inside of the vehicle. *Id*. The trial court refused to give a

lesser-included offense instruction. *Id*. at 922-23. However, this Court reasoned that the defendant was entitled to the lesser-included offense charge, because if **any combination of the evidence** entitles a defendant to a lesser-included offense instruction, the defendant should get the instruction. *Id*. at 929. This Court made clear in *Bullock*, that when applying the lesser-included offense analysis, a jury may "believe only portions of certain witnesses' testimony," and that more importantly, "it is the jury's province to decide which parts of the evidence to believe." *Id*. Here, there is certainly a combination of the evidence that supports a jury rationally determining that Mr. Ransier was not guilty of tampering with physical evidence by alteration or destruction but guilty only of attempted tampering with physical evidence by alteration or destruction. *Id*.

No Needle

Alternatively, Mr. Ransier maintains that Sergeant Kral's testimony, when viewed in connection with the evidence, or lack thereof, leaves open the conclusion that the syringe did not ever have a needle attached to it the evening of the alleged offenses, and therefore, Mr. Ransier only attempted to conceal the syringe. (3 RR 45-48; 137-146). For, the fact that a group of highly skilled law enforcement officers conducted a search and never located a needle begs the question of whether or not there ever actually was

a needle. (3 RR 142-143). Additionally, Sergeant Kral conceded in the record below that his own offense report never mentioned once that Mr. Ransier had actually broke the syringe. (3 RR 44-45). Also, Sergeant Kral conceded that he never stated on the four hours of video associated with the case, that Mr. Ransier broke the syringe. (3 RR 44-45). Mr. Ransier contends that the above portions in the record, considered in conjunction with the lack of a needle in evidence, constitute some evidence for the jury that the syringe in question was never altered in anyway, as it is possible that a needle was not attached to the syringe the evening of the alleged offense. (3 RR 45-48; 137-146).

The State has argued that the fact that Sergeant Kral testified that Mr. Ransier had his thumb on the needle is evidence that there was a needle, however Mr. Ransier would counter this argument with the fact that Sergeant Kral used the term needle and syringe interchangeably throughout his testimony. (3 RR 47).

Broken Needle

Alternatively, a reading of Sergeant Kral's testimony could also be interpreted by the jury as the needle never being completely detached from the syringe, as the below testimony suggests that the needle was actually attached to the syringe before law enforcement collected the

methamphetamine out of the syringe:

"Q. Okay. And ultimately the syringe, it had evidentiary value, did it not, that you were able to send it off and get it tested. Right?

A. We were able to salvage a drop out of the broken end of the needle.

Q. The broken end of the—you mean the syringe?

A. No. Out of the tip. The tip had broken off. He was successful in breaking that part, and so that's where we were able to drop that out of it." (3 RR 48).

It is important to note that just prior to the above testimony, Mr. Ransier's trial counsel actually clarified with Sergeant Kral the distinction between the term syringe and needle, that Sergeant Kral was using interchangeably, stating, "I am going to make it easier—we have the needle that is attached to the top of the pokey part, then we've got the syringe which is actually the part—the tube that has the liquid in it. Right?" (3 RR 47). Therefore, when Sergeant Kral testified that the tip of the needle had broken off, one must presume that Sergeant Kral was actually referring to the needle itself. (3 RR 47-48). This testimony casts doubts on what the original state of the syringe was the evening of the alleged offense, and ultimately whether Mr. Ransier altered the syringe. When examining this testimony, Mr. Ransier would urge the Court to take into account that the

ultimate credibility of Sergeant Kral is also questionable, and therefore, the jury could have doubted the reliability of Sergeant Kral's testimony. *Griffin v. State*, 491 S.W.3d 771, 774 (Tex.Crim.App. 2016). For, it is peculiar that Sergeant failed to document in any manner that the syringe was actually damaged, but documented a great deal of evidence that was not even relevant to the charged offenses. (3 RR 45, 137-146). Moreover, Sergeant Kral's testimony that he "quite possibly" just left the needle in question at the scene is counterintuitive and lacks credibility, as law enforcement would not just leave hazardous evidence in a public place. (3 RR 45). In *Sweed*, this Court made clear that it is the jury's province to decide which parts of the evidence to believe or disbelieve. *Sweed v. State*, 351 S.W.3d 63, 69 (Tex.Crim.App. 2011). Therefore, when assessing whether or not Mr. Ransier actually altered the syringe, a jury could have certainly viewed Sergeant Kral's testimony in light of his other questionable testimony, and determined that the syringe was not altered. (3 RR 45, 137-146).

Specific Intent

Last, Mr. Ransier contends that the requisite specific intent necessary under the tampering with physical evidence statute could lead a rational jury to actually acquit Mr. Ransier of altering the syringe. The requisite specific intent under the tampering with physical evidence statute is that a defendant

alter, destroy, or conceal any record, document, or thing, with the intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding. Tex. Penal Code § 37.09. A syringe is a thing, not a record or document, and the terms verity or legibility are not applicable to a syringe. *Id*. Therefore, in Mr. Ransier's case, with regard to alteration, the State had to prove that Mr. Ransier, with the intent to impair the availability of the syringe as evidence, did alter the syringe. *Id*. However, unlike Mr. Ransier's attempt to conceal the syringe, where his clear intent was to actually impair the availability of the syringe as evidence by hiding it, in regard to alteration, Mr. Ransier never possessed the dual specific intents to alter the syringe **and** impair the availability of the syringe as evidence. *Id*. For, Mr. Ransier's action in attempting to break the syringe was commonsensically only in the hopes of making the methamphetamine inside of the syringe, **not** the syringe itself, unavailable as evidence. *Id*.

It is important to note that the forensic scientist from the Texas Department of Public Safety testified that the Texas Department of Public Safety's policy is to not even test syringes due to their hazardous nature:

"Q. Now, if there was a needle that was attached to the syringe at some point, should that needle have been submitted to you?

A. Given that we do not test syringes without an explicit order due to the

hazard present due to lab—or to laboratory personnel, we accept syringes as they are submitted, needle or otherwise.

Q. If the needle was part of that syringe, would you want it to be part of the test?

A. It wouldn't have changed how I did my testing, no." (3 RR 63, 66).

The Texas Department of Public Safety's policy supports Mr. Ransier's contention that Mr. Ransier lacked the specific intent to impair the availability of the syringe as evidence, as the syringe does not have any actual evidentiary value *per se*, rather, it is the methamphetamine contained inside of the syringe that does. (3 RR 63. 66).

Causation

The State argues at great length that under the principles of causation found in the Texas Penal Code, Mr. Ransier is still accountable for the syringe breaking even if the act of Sergeant Kral forcibly throwing Mr. Ransier a great distance into a cactus is what actually broke the syringe. (STATE'S BRIEF 16-27). However, the issues of concurrent cause and criminal responsibility for the conduct of another are issues for a jury to decide, not this Court. Tex. Penal Code § 6.04; Tex. Penal Code § 7.01; Tex. Penal Code § 7.02; *Wooten v. State*, 267 S.W. 3d 289, 296 (Tex.App.-Houston [14th Dist.] 2009). The State cannot have its cake and eat it too; if

the State believes that a party theory or concurrent cause instruction was warranted in this case, then the State could have easily requested these instruction ***if*** the trial court had actually granted the lesser-included offense instruction, as the trial court was inclined to. (3 RR 81-84). However, instead of simply allowing the lesser-included offense instruction to be included in the charge of the court and requesting a coinciding concurrent cause or party theory instruction, the State objected to the attempted tampering with physical evidence charge, knowing that the State would be forced to address the error on appeal. (3 RR 81-84).

However, if the Court were to entertain the State's arguments, and assume the role of the jury, Mr. Ransier would first contend that the case law is well settled that if a concurrent cause is clearly sufficient, by itself, to produce the result, and the defendant's conduct, by itself, is clearly insufficient, then the defendant cannot be convicted of the offense. *Robbins v. State*, 717 S.W.2d 348, 351 (Tex.Crim.App. 1986). Mr. Ransier asserts that the evidence from the record detailed above confirms that Sergeant Kral's action of hurling Mr. Ransier out of his vehicle was sufficient, by itself, to cause the needle to detach from the syringe. (STATE'S EXHIBIT NUMBER ONE).

The State cites to an unpublished case out of the Austin Court of

Appeals to support the State's argument regarding Mr. Ransier's "contributory conduct." *Tam Ha Huynh v. State,* No. 03-17-00645-CR; (STATE'S BRIEF 19). However, that case involved jury charge error, and the Third Court ultimately concluded that it was not error for the trial court to deny the defendant's proposed **jury instruction** regarding section 6.04 of the Texas Penal Code. *Id*.

The State also argues that the Fourteenth Court of Appeal's Opinion incorrectly places a foreseeability component on Texas Penal Code § 6.04. (STATE'S BREIF 23). However, this Court in *Williams v. State* clearly articulated in regard to the principles of causation that, "Obviously, some element of **foreseeability** limits criminal causation just as it limits principles of civil "proximate causation." *Williams v. State*, 235 S.W.3d 742, 765 (Tex.Crim.App. 2007). In *Williams*, the defendant's children were killed in an accidental house fire after the defendant left her children to sleep at a home with no utilities and a lit candle. *Id*. This Court held that the defendant was not criminally responsible for the series of events that led to to her children's death, because the intervening causes that led to the fire were not reasonably foreseeable on the defendant's part. *Id*. at 766. Similarly, Mr. Ransier would maintain that it was not reasonably foreseeable that the act of trying to conceal a syringe would cause Sergeant Kral to

launch Mr. Ransier a great distance out of his vehicle and into a cactus. (3 RR 38).

The State attempts to illustrate foreseeability in hypotheticals involving struggles between defendants and law enforcement over firearms, however these hypotheticals are entirely different then the interaction between Sergeant Kral and Mr. Ransier, which did not involve any type of resistance on Mr. Ransier's part, and more importantly did not involve a deadly weapon. If Mr. Ransier had a firearm in his possession and was shoving it under his seat, or took Sergeant Kral's firearm from Sergeant Kral, as occurs in the State's hypotheticals, then Mr. Ransier would expect that Sergeant Kral would be extremely forceful and aggressive in order to retrieve the firearm. Simply stated, tussling with law enforcement over a stolen firearm is very different than a drug user simply attempting to conceal a syringe from law enforcement, and the two fact scenarios are not comparable for purposes of the Court's analysis.

The State also relies on this Court's opinion in *Thompson v. State*, however, *Thompson* involved the construction of Texas Penal Code 6.04**(b)(1)**, and whether the defense of mistake of fact is applicable to the law of transferred intent. *Thompson v. State*, 236 S.W.3d 787 (Tex.Crim.App. 2007). The State's overall logic in comparing *Thompson* to

Mr. Ransier's case is simply faulty, because in Mr. Ransier's case a different offense then what Mr. Ransier originally desired to commit did not occur. *Id*.

The State further cites to the Dallas Court of Appeal's decision in *McMillian v. State*, in an attempt to demonstrate how sections 7.01 and 7.02 of the Penal Code are applicable in Mr. Ransier's case. *McMillan v. State*, 696 S.W.2d 584, 585 (Tex.App.—Dallas, 1984). However, what the State again ignores is that even if party theory is applicable in the case at hand that is an issue that only a jury can ultimately decide. *Id*. For, even in the case of *McMillian v. State*, which the State relies, the Dallas Court of Appeals makes this clear, stating that, "if the evidence supports a *charge* on the law of parties, as it does here, the court may *charge* on the law of parties even though there is not such allegation in the indictment." *McMillan v. State*, 696 S.W.2d 584, 585 (Tex.App.—Dallas, 1984). *McMillan* can further be distinguished by the fact that the defendant in that case actually directed another person to make a false entry in a governmental record. *Id*. Whereas, Mr. Ransier never directed Sergeant Kral to actually "engage in conduct prohibited by the definition of the offense" of tampering with physical evidence. Tex. Penal Code § 7.02. This is precisely why the Fourteenth Court of Appeals rejected the State's argument, as the court made clear in

its' opinion dismissing the State's Motion for Rehearing that, "nowhere in the majority opinion did we conclude that Kral broke the needle." Sergeant Kral forcibly threw Mr. Ransier out of his vehicle into a cactus, Sergeant Kral did not actually break the syringe with his own hands, unlike the innocent person who actually forged the government record in *McMillian*. *Id*.

Concealment

Next, based on the totality of the record below, it is possible a jury could have rationally found that if Mr. Ransier was guilty, he was only guilty of the lesser-included offense of attempted tampering with physical evidence, with regard to concealing the syringe. *Rice v. State*, 333 S.W.3d 140, 145 (Tex.Crim.App. 2011). Mr. Ransier would contend that the testimony of Sergeant Kral combined with the interview of Mr. Ransier, and the video of the scene, supports that Mr. Ransier only *attempted* to conceal the syringe. (STATE'S EXHIBIT NUMBER 1); (STATE'S EXHIBIT NUMBER 2).

The term "conceal" is not defined by the tampering statute or anywhere else in the Texas Penal Code. However, several appellate courts have attempted to define what "conceal" means. The Amarillo Court of appeals has held that "conceal" means "to prevent disclosure or recognition of" or

"to place out of sight." *Meals v. State*, 601 S.W.3d 390, 396 (Tex.App.-–Amarillo, 2020, pet. ref'd). The Fort Worth Court of Appeals has discussed that "conceal" means "the act of removing from sight or notice; hiding." *Rotternberry v. State*, 245 S.W.3d 583, 589 (Tex.App.--Fort Worth 2007). The Austin Court of Appeals has discussed that "conceal" means "to hide or keep from observation, discovery, or understanding; keep secret." *Hollingsworth v. State*, 15 S.W.3d 586, 595 (Tex.App.--Austin 2000). More importantly, this Court has recently held that "actual concealment requires a showing that the allegedly concealed item was hidden, removed from sight or notice, or kept from discovery or observation." *Stahmann v. State*, 602 S.W.3d 573, 581 (Tex.Crim.App. 2020).

The record below establishes that instead of concealing evidence as defined by the Court in *Stahmann*, Mr. Ransier's conduct is what actually exposed the evidence of the syringe into Sergeant Kral's view. *Id*. Again, Mr. Ransier was put in a position by law enforcement, that he was essentially conducting a search of his own vehicle, and instead of just leaving the syringe in its original location unnoticed from law enforcement, Mr. Ransier instead picked up the syringe so that he could attempt to move it under his seat in order to keep it concealed from Sergeant Kral. (3 RR 36); (1 SRR 26). However, Mr. Ransier held the syringe in his hand in such a

manner that he did not actually ever conceal the syringe from Sergeant Kral's view, but in a way so that Sergeant Kral was immediately able to recognized the syringe and know of the syringe's whereabouts. *Id*.; *Thorton v. State*, 425 S.W.3d, 304 (Tex.Crim.App. 2014); *Rabb v. State*, 387 S.W.3d 67, 71 (Tex.App.- Amarillo 2012), *aff'd*, 434 S.W.3d 613 (Tex.Crim.App. 2014). This is apparent not only from the video of the scene, but by Sergeant Kral's own testimony. (STATE'S EXHIBIT NUMBER 1). Sergeant Kral testified below that he knew where the syringe was at all times from the point when he first saw the syringe in Mr. Ransier's hand up until the point that the syringe was on the ground. Specifically, the record reflects the following testimony:

"Q: Now, when you were—from the point that you saw Mr. Ransier with the syringe in his hand until the time you got him to the ground, would it be fair to say that you knew where that syringe was the whole time?"

A: From the –from the interaction that I had with him?

Q: Yes.

A: And to the point that we went to the ground?

Q: Yes.

A: Yes." (3 RR 49).

The State argues that Mr. Ransier's and the Fourteenth Court of

Appeals' interpretation of the above portion of the record are incorrect. First, Mr. Ransier would contend that the above testimony is unambiguous as to the fact that Mr. Ransier never succeeded in ever concealing the syringe from Sergeant Kral, as Sergeant Kral always knew the whereabouts of the syringe, and the syringe was never hidden for his view. (3 RR 49). However, even if the Court were to find ambiguity in this testimony, a lesser-included instruction should still have been granted, as lesser-included offense instructions should be granted even if the evidence supporting the instruction is subject to different interpretations. *Sweed v. State*. 351 S.W.3d 63, 68 (Tex.Crim.App. 2011). Sergeant Kral also repeatedly testified below that Mr. Ransier was only "trying" to conceal the syringe by shoving it under the seat, when he testified regarding Mr. Ransier's actions that, "he was actively **trying** to break it and shove it [the syringe] underneath the seat," he was still actively **trying** to break it [the syringe] and shove it under the seat." (3 RR 38). Based on Sergeant Kral's testimony, along with the video of the scene, the jury could have easily formed the conclusion that Mr. Ransier never actually concealed the syringe, only attempted to conceal the syringe, because the syringe was never actually hidden, or removed from Sergeant Kral's sight or notice, or kept from Sergeant Kral's discovery or observation. *Stahmann v. State*, 602 S.W.3d 573, 581 (Tex.Crim.App.

2020).

Additionally, during State's Exhibit Number Two, Sergeant Kral asks Mr. Ransier, "when you were going back inside of the truck, and you were going after that syringe, were you **trying** to break it or **trying** to get rid of it," and Mr. Ransier responds, "that was the intention, yes, sir." (STATE'S EXHIBIT NUMBER TWO). This confirms that Mr. Ransier never actually "got rid" of the syringe by hiding it so that it would not be discovered. *Id*.

Again, the proper analysis in the case at hand requires a reviewing court to consider the totality of the evidence, without reference to whether or not that evidence is controverted or conflicting. *Goad v. State*, 354 S.W.3d 443, 446-47 (Tex.Crim.App. 2011). For all these reasons, Mr. Ransier maintains that he did not successfully conceal the syringe from Sergeant Kral, as required to sustain a conviction for Tampering with Physical Evidence by concealment. (3 RR 49); *Stahmann v. State*, 602 S.W.3d 573, 581 (Tex.Crim.App. 2002); *Thorton v. State*, 425 S.W.3d, 304 (Tex.Crim.App. 2014); *Rabb v. State*, 387 S.W.3d 67, 71 (Tex.App.- Amarillo 2012), *aff'd*, 434 S.W.3d 613 (Tex.Crim. App. 2014).

Lesser-Included v. Sufficiency

The Court did not grant briefing on this issue, however, because the State still briefed the issue, Mr. Ransier will quickly counter the claims

made in the State's brief that the Fourteenth Court of Appeals should not have rejected the State's attempts to use the sufficiency of evidence standard in its analysis.

In *Ritcherson v. State*, this Court patently rejected the argument that appellate courts should apply legal-sufficiency law when analyzing lesser-included offense instruction cases. *Ritcherson v. State*, 568 S.W.3d 667, 676 (Tex.Crim.App. 2018). The Court stated regarding the lower court's opinion in *Ritcherson* that, "it appears to have applied legal-sufficiency law instead of lesser-included-offense law. In that respect the court of appeals erred. The issue is not whether a rational jury could have found Appellant guilty of murder; it is whether a jury could reasonably interpreted the record in such a way that it could find Appellant guilty of only manslaughter." *Id*. However, the State now urges this Court to conduct an improper analysis, as the evidence to support a lesser-included offense instruction is viewed in the light most favorable to a defendant, not based on the verdict of guilty on the greater offense. *Id*. The only appropriate inquiry is not whether a rational jury could have found Mr. Ransier guilty of tampering with physical evidence, it is whether a jury could have reasonably interpreted the record in such a way that is could find Mr. Ransier guilty of only attempted tampering with physical evidence. *Id*.

Conclusion

Again, it is important to take into account the fact that the trial court originally granted Mr. Ransier's request for an attempted instruction, however, the State was adamant that the lesser-included offense instruction should not be given, and that the State would rather address the error on appeal then to simply allow the jury to have the alternative instruction. (3 RR 82-85). Mr. Ransier would respectfully urge the Court to take the State's hardline position on the record into consideration when analyzing the State's position before this Court that no rational jury could have convicted Mr. Ransier of attempted tampering. (3 RR 82-85). For, if the State is so confident that a jury could not have rationally found Mr. Ransier guilty of only attempted tampering, then in the interest of judicial economy, the State could have easily just not objected to the trial court including the attempted tampering with physical evidence instruction. (3 RR 82-85).

In conclusion, Mr. Ransier would respectfully urge the Court to adhere to the Court's recent rulings that have signaled to the lower courts that lesser-included offense instructions should largely be granted by trial court's if there is more than a scintilla of evidence supporting such an instruction. *Bullock v. State*, 509 S.W.3d 921 (Tex.Crim.App. 2017); *Roy v. State*, 509 S.W.3d 315 (Tex.Crim.App. 2017); *Safian v. State*, 543 S.W.3d 216

(Tex.Crim.App. 2018).

The Fourteenth Court of Appeal's Supplemental Majority Opinion on Rehearing relied upon the Court's recent tampering with physical evidence decisions, stating that, "the Court of Criminal Appeals reviews tampering cases in a much different manner than murder cases. Recent Court of Criminal Appeals Cases addressing sufficiency challenges to tampering convictions have held the convictions were not supported by the evidence." *See Rabb*, 483 S.W.3d at 22-24 (evidence insufficient to prove tampering by swallowing baggie of drugs but sufficient to prove attempted tampering); *Thornton*, 425 S.W.3d at 293-94, 303-07 (dropping crack pipe was insufficient to prove tampering, but sufficient to prove attempted tampering); *Rabb v. State*, 434 S.W.3d 613, 617-18 (Tex.Crim.App. 2014) (swallowing plastic bag was insufficient to prove destroying evidence, case remanded for consideration of attempted tampering)." Mr. Ransier would urge the Court to follow the overall reasoning contained in the Court's above-cited opinions, along with the newly published opinion of *Stahmann*, and affirm the reversal of his conviction for tampering with physical evidence.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Charles Ransier, prays

that this Honorable Court will affirm the ruling of the Fourteenth Court of Appeals, or enter any other appropriate relief under the facts and the law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to TEX. R. APP. P. 9.5, I certify that of October 19, 2020, a copy of this motion was electronically served, to the following:

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/s/ Amanda Erwin
Amanda Erwin

CERTIFICATE OF COMPLIANCE STATING NUMBER OF WORDS IN BRIEF

Pursuant to Tex. R. App. P. 9.4(i), Appellant certifies that this Appellate Brief contains only 7,934 words, and is therefore compliant with the maximum word limitation allowed by the Honorable Court.

/s/ Amanda Erwin

_____

Amanda Erwin

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